

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

JOSE HERNANDEZ-CUELLAR,
#26608-078

VS.

UNITED STATES OF AMERICA

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CIVIL ACTION NO. 4:22cv147
CRIMINAL ACTION NO. 4:16cr111(1)

**MEMORANDUM ADOPTING REPORT AND
RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

This case was referred to United States Magistrate Judge Aileen Goldman Durrett, who issued a Report and Recommendation (Dkt. #25) (“the Report”) recommending that the Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 be denied and that the case be dismissed with prejudice. Movant filed objections. (Dkt. #31).

In the objections, Movant argues that the Magistrate Judge erred in finding that the § 2255 motion was untimely. (Dkt. #31, pp. 2-6). Movant misconstrues the Magistrate Judge’s findings and conclusions regarding timeliness of the § 2255 motion. The Magistrate Judge found that the government had not “presented any conclusive evidence to rebut Movant’s sworn statement that he placed his § 2255 motion in the prison mail system on March 15, 2020, which would make his motion timely.” (Dkt. #25, p. 4). The Magistrate Judge thus concluded: “Because it cannot be definitively determined based on the current record that Movant did *not* mail the present § 2255 motion in March 2020, and thus, that Movant’s § 2255 motion is untimely, out of an abundance of caution, the court will address his claims on the merits.” *Id.* at p. 5. The Magistrate Judge then addressed the merits of Movant’s ineffective assistance of counsel claims. Thus, Movant’s objection is without merit.

Movant also reurges the issues raised in his § 2255 motion. The Court has reviewed the tendered objections, and they generally add nothing new to Movant's prior contentions in this case. Despite his arguments, Movant fails to show that the Report is in error or that he is entitled to relief on his ineffective assistance of counsel claims. Furthermore, claims he raises for the first time in his objections to the Report are not properly before the Court. *See Finley v. Johnson*, 243 F.3d 215, 218 n.3 (5th Cir. 2001).

Next, Movant objects to the Magistrate Judge's Order in the Report granting the government's request to seal certain pages of the exhibits attached to Movant's memorandum because they either contain statements identifying the victims of Movant's exploitation offense, in violation of 18 U.S.C. § 3509(d), or reflect sealed court documents in the underlying criminal case. (Dkt. #31, pp. 14-15). Rule 72 of the Federal Rules of Civil Procedure provides that the District Judge must consider timely objections and modify or set aside any part of a non-dispositive order that is clearly erroneous or is contrary to law. Fed. R. Civ. P. 72(a). Movant has not made a cogent argument regarding the Magistrate Judge's Order sealing certain of the exhibits. He fails to show the Magistrate Judge's Order is clearly erroneous or contrary to the law. Fed. R. Civ. P. 72(a). Movant's objections to the Order are overruled.

Finally, Movant objects to the Magistrate Judge's recommendation that a certificate of appealability be denied. (Dkt. #31, p. 15). Movant does not address the Magistrate Judge's denial of a certificate of appealability based on the grounds raised in his § 2255 motion. Instead, he argues that he is entitled to a certificate of appealability based on issues not raised in his § 2255 motion. Thus, the Court would have to evaluate additional reasons that were not raised in his § 2255 motion. As these contentions fall outside the purview of the Court's review, the Court declines to

address them. For the reasons stated in the Report, the Court agrees with the Magistrate Judge that this action does not warrant a certificate of appealability.

The Report of the Magistrate Judge, which contains proposed findings of fact and recommendations for the disposition of such action, has been presented for consideration. Having made a *de novo* review of the objections raised by Movant to the Report, the Court concludes that the findings and conclusions of the Magistrate Judge are correct and adopts the same as the findings and conclusions of the Court.

It is therefore **ORDERED** that the Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 is **DENIED** and the case is **DISMISSED** with prejudice. It is further **ORDERED** that a certificate of appealability is **DENIED**. All motions by either party not previously ruled on are hereby **DENIED**.

SIGNED this 10th day of March, 2025.


AMOS L. MAZZANT
UNITED STATES DISTRICT JUDGE